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No. 37

SUPREME COURT

In the [redacted] of the United States

OCTOBER TERM, 1945

EDNA W. BALLARD AND DONALD BALLARD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUT COURT OF APPEALS FOR THE NINTH CIRCUT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 782

EDNA W. BALLARD AND DONALD BALLARD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The original opinion of the circuit court of appeals on the remand of this case (R. 1642–1643), and the majority and dissenting opinions on denial of a petition for rehearing (R. 1645–1673), have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 29, 1945 (R. 1643), and a petition for rehearing was denied December 26, 1945 (R. 1644). The petition for a writ of certiorari

was filed January 28, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a trial for mail fraud by the propagation of a purported religious movement, conducted on the theory that the truth or falsity of religious representations was not an issue for the jury but that petitioners could be convicted if they did not honestly believe what they preached, constituted a violation of the First Amendment.

2. Whether the indictment was sufficient to support the case as tried under the judge's instruction, and whether that instruction resulted in a fatal amendment of the indictment.

3. Whether the prosecutor was guilty of prejudicial misconduct.

4. Whether the exclusion of women from the panel of grand and petit jurors requires reversal of petitioners' conviction.

STATEMENT

Petitioners were convicted in the United States District Court for the Southern District of California under several counts of an indictment charging use of the mails in execution of a scheme to defraud through the propagation of a pur-

ported religious organization known as the "I Am" movement (R. 2–22, 170–171). Edna Ballard was sentenced to imprisonment for one year and to pay fines totalling $8,000, and Donald Ballard was sentenced to imprisonment for 30 days and to pay fines totaling $400. Both prison sentences were suspended and petitioners placed on probation for one year. (R. 180–182.)

On appeal to the Circuit Court of Appeals for the Ninth Circuit, the convictions were reversed on the ground that the trial judge had erred in instructing the jury that the truth or falsity of petitioners' representations of religious belief was not an issue for their determination but that petitioners could be found guilty if they perpetrated a scheme to defraud by preaching doctrines which they did not honestly believe. 138 F. 2d 540. This Court granted certiorari, 320 U. S. 733, and subsequently held that the court below was in error in holding that the truth or falsity of petitioners' representations of religious belief should have been submitted to the jury. It reversed the judgment of the circuit court of appeals and remanded the cause for consideration of other issues raised by petitioners. 322 U. S. 78.

The facts are fully set forth in the government's prior brief in this Court (No. 472, O. T. 1943). On the remand, a majority of the circuit court of appeals affirmed the judgment of conviction without opinion (R. 1642–1643), Judge Denman

dissenting in an opinion which was subsequently withdrawn (R. 1642, 1643). A petition for rehearing was filed, and on denial of that petition the majority wrote an opinion (R. 1645–1649), Judge Denman again dissenting (R. 1650–1673).

ARGUMENT

1. The most important question raised by the petition for certiorari is the constitutionality of the prosecution, i. e., whether the First Amendment was violated by virtue of the judge's instruction allowing the jury to convict if they found that petitioners had devised a scheme to defraud by propagating religious doctrines which they did not themselves believe. Conflicting views on this issue were expressed by the justices who dissented from the original opinion of this Court. While we do not deny that any question touching upon religious liberty is to that extent a question of importance, we think there is no need for further consideration of that issue in this case.

It is clear that the First Amendment does not give a blanket immunity from prosecution for fraud to any one who undertakes to set himself up as a religious leader. Justice Jackson, who previously voted to dismiss this indictment, recognized that religious leaders could properly be convicted for making false representations on matters other than faith or experience. 322 U. S. at page 95. We think the same principle would necessarily apply if religious leaders made false

representations of fact even as to matters which touch upon religious principles. Thus, if persons, in order to obtain money for themselves by a purported religious movement, represented that they had in their actual physical possession a lump of gold precipitated from the air, whereas it was shown that they had obtained the gold by melting down some old jewelry, we do not believe a prosecution for fraud could be attacked on constitutional grounds. See dissenting opinion of the Chief Justice, 322 U. S. at page 89. There is no essential difference where the issue of fact tried by the jury is the fact of a defendant's lack of belief. If, for example, a defendant made direct admissions that he did not believe his teachings but organized the movement merely to obtain money from the credulous, we do not think that he would be in a position to claim that the First Amendment empowers him to use the mails with impunity in furtherance of his activities. The object of the First Amendment is to allow all to believe as they choose. Manifestly one who has no belief is not injured in his right to believe when he is prosecuted for falsely pretending that he does. Thus, logically, prosecution for falsely pretending to believe in no way infringes on the right to believe.

The attack on the constitutionality of this prosecution is based, not on the ground that the right to believe includes the right to pretend that one believes, but on the apprehension

that proof of lack of belief may involve an infringement of the right of innocent persons to entertain unorthodox views. That apprehension relates only to some possible future prosecution. None of the Justices of this Court or of the courts below who passed on this case entertained any doubts that these particular petitioners were guilty of gross fraud. Hence the personal religious liberties of these petitioners is not here involved. The constitutional question concerns only possible ramifications that may arise in some other case, but which may never arise at all. It is now four years since petitioners were convicted and sentenced. In that period we know of only one fraud prosecution against the leader of a religious cult, the *Carruthers* case presently before this Court (No. 763), and there the prosecution was based wholly on the commercial activities of the defendant in obtaining money for purported business investments. We suggest, therefore, that consideration of the possible dangers that may arise at some future time may well be deferred until such time as a real question of infringement of religious liberty presents itself. This Court has condemned the practice of suggesting extreme cases which may never arise in order to test the constitutionality of a statute. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 526; *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 467. We submit that the same principle is applicable here. The Con-

stitution does not protect fraud, and, in this case, fraud was clearly shown.

On the merits of the question, we submit that the trial of a defendant for devising a scheme to defraud by propagating a religious movement in which he does not believe raises no such danger of infringement of the right to believe as to make it unconstitutional to try the case on such a theory. Justice Jackson's fear that the statute may be applied to persons who have "less than full belief in a professed credo" overlooks, we submit, the fact that the crime condemned by the mail fraud statute is the use of the mails in execution of a "scheme" either to defraud or to obtain money or property by false representations. It is not merely lack of belief or even solicitation of money without belief that is the crime. The offense is the solicitation of money without belief under such circumstances that it amounts to an "intentional effort to despoil the public," i. e., a scheme to defraud.[1] There is, it is true, no fixed line marking the distinction between the solicitation of funds by persons who may entertain some doubts as to the tenets they profess and the devis-

[1] A scheme to defraud has been broadly interpreted as including all intentional efforts to despoil the public. *Durland* v. *United States*, 161 U. S. 306, 314; *Brooks* v. *United States*, 146 Fed. 223, 227 (C. C. A. 8); *Fournier* v. *United States*, 58 F. 2d 3, 5 (C. C. A. 7), certiorari denied, 286 U. S. 565; *United States* v. *Rowe*, 56 F. 2d 747, 749 (C. C. A. 2), certiorari denied, 286 U. S. 554.

ing of a scheme to defraud, but the absence of a fixed line of demarcation between guilt and innocence has never been considered a ground for barring the prosecution of those who are clearly guilty. See *Screws* v. *United States*, 325 U. S. 91; *Robinson* v. *United States*, 325 U. S. 282, 286. Freedom of speech is as much a tenet of American political philosophy as freedom of religion; yet Congress and this Court have recognized that it does not serve to protect all forms of utterances. The "clear and present danger" doctrine enunciated in *Schenck* v. *United States*, 249 U. S. 47, which is recognized as a test for distinguishing between free and prohibited speech in war time, is not a rigid standard definable in absolute terms; the mental state, the intent with which particular words are uttered, may determine the question of guilt or innocence. *Hartzel* v. *United States*, 322 U. S. 680; see also dissenting opinion of Justice Holmes in *Abrams* v. *United States*, 250 U. S. 616, 628. It has never been suggested, however, that for this reason a person clearly shown to have the requisite intent to violate the statute may not be prosecuted. Intent is an issue determined by juries in every prosecution for a major crime. It is, of course, always an important issue in every mail fraud prosecution. The fact that human understanding has not progressed to the point where religious phenomena can be the subject of proof does not mean that a jury cannot distinguish between unorthodox views honestly entertained

and views professed without belief as part of an intentional effort to despoil the public.[2]

2. Petitioners' contentions that the indictment failed to allege lack of belief (Pet. 40–47) and that the court's instructions to the jury not to consider the truth or falsity of religious representations resulted in an unconstitutional amendment of the indictment (Pet. 57–61), are fully answered in the dissenting opinion of the Chief Justice. 322 U. S. at pages 90–92. We think it is clear, as the Chief Justice there stated, that "the indictment plainly charged both falsity of, and lack of good faith belief in the representations made." Each of paragraphs 1–18 first sets forth a particular representation and then alleges that defendants "well knew" that the representation was false. Paragraph 19 alleges that all of the representations were made as part of the scheme to defraud by means of oral statements, books, magazines, etc., "constructed and expressed as to deceive" and intended to deceive. Paragraph 20 alleges that the defendants well knew that the representations were false and that they were made with intent to defraud for the purpose

[2] As to the argument (Pet. 53–54) that a trial on the issue of belief precludes a defendant from offering proof of the occurrence of a miracle, it is sufficient for present purposes to note, as we pointed out in our prior brief in this Court (pp. 27–30), that these petitioners were not deprived of the opportunity to offer any evidence which they wished to offer. They welcomed the trial judge's instruction eliminating the issue of truth or falsity from the case.

of enabling the defendants to enrich themselves. The allegation that defendants "well knew" that their representations were false and fraudulent necessarily includes the charge that they did not believe the representations, for if a person knows a statement to be untrue, he must believe it to be false. Petitioners argue (Pet. 43–45) that such allegations are common in ordinary indictments charging fraudulent misrepresentations of fact. This merely emphasizes, however, that the issue of a person's good faith belief in his representations is inherent in every charge of fraud and particularly in all indictments under the mail fraud statute. See *Knickerbocker Merchandising Co.* v. *United States*, 13 F. 2d 544, 546 (C. C. A. 2), certiorari denied, 273 U. S. 729. In view of the allegations as to petitioners' knowledge of the falsity of their representations as well as the general allegations of paragraphs 19 and 20, the indictment was clearly sufficient to charge the offense in the manner in which it was actually tried under the judge's instruction to the jury.

Since the indictment charged both falsity of and lack of good faith belief in the representations made, the action of the trial judge in withdrawing the issue of falsity did not result in a fatal amendment of the indictment. The allegations of falsity were, under the doctrine enunciated by the prior decision of this Court, improper, since they could not be tried, but it is well established that unnecessary allegations may be

treated as surplusage and disregarded. *Ford* v. *United States*, 273 U. S. 593, 602; *United States* v. *Buckner*, 108 F. 2d 921, 925 (C. C. A. 2), certiorari denied, 309 U. S. 669; *Sondericker* v. *United States*, 41 F. 2d 144 (C. C. A. 7); *Maresca* v. *United States*, 277 Fed. 727, 742 (C. C. A. 2), certiorari denied, 257 U. S. 657; *Bailey* v. *United States*, 5 F. 2d 437 (C. C. A. 5), petition dismissed, 269 U. S. 551, 589. As the Chief Justice pointed out, the action of the trial judge in withdrawing the issue of falsity was merely the rejection of one of the two alleged methods of committing the offense as was done in *Salinger* v. *United States*, 272 U. S. 542, 548–549, and *Ford* v. *United States*, 273 U. S. 593, 602. The judge's action here was thus in accord with well settled principles of law.

3. The opening argument of government counsel covers 143 printed pages of the record (R. 1181–1324); the closing argument 52 pages (R. 1493–1545). Manifestly the effect of such arguments cannot be judged by taking isolated phrases out of their context and subjecting them to close scrutiny. The question is not whether particular sentences may or may not have been improper, but whether, in the light of the whole case, the prosecutor's conduct was such as to deprive petitioners of a fair trial. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239–240; *Pietch* v. *United States*, 110 F. 2d 817, 822 (C. C. A. 10), certiorari denied, 310 U. S. 648. The nature of the charge,

the general atmosphere of the trial, the action of defense counsel in interposing objections, the strength of the evidence, are all factors to be considered in determining whether remarks of counsel constitute ground for reversal.

Reading the arguments as a whole, we submit that the majority of the court below properly held that they did not exceed the bounds of propriety (R. 1648–1649). Many of the remarks to which petitioners refer were not improper. The essence of the charge in this case, amply supported by the evidence, is that petitioners were using religion as means to defraud. The references to the petitioners as frauds or "fakers" (Pet. 30–31) was therefore merely a permissible characterization of the whole theory of the case. *Randle* v. *United States,* 113 F. 2d 945, 950 (App. D. C.), certiorari denied, 311 U. S. 683; *Schmidtberger* v. *United States,* 129 F. 2d 390 (C. C. A. 8); *Gray* v. *United States,* 14 F. 2d 366, 367 (C. C. A. 8). Much stronger denunciations of defendants have been upheld. *United States* v. *Wexler,* 79 F. 2d 526, 530 (C. C. A. 2), certiorari denied, 297 U. S. 703; *United States* v. *Holt,* 108 F. 2d 365, 369 (C. C. A. 7), certiorari denied, 309 U. S. 672. The alleged assertions by the prosecutor of matters of personal knowledge set forth at pages 32 to 34 of the petition disclose on their face that they were rhetorical in nature and were not assertions of fact outside the evidence. The reference in

closing argument to a prior conviction of other purported religious leaders (Pet. 33–34) was in answer to defense counsel's argument that the trial was a novel one, the prosecutor expressly stating that he mentioned the earlier case only because the defense counsel had done so (R. 1497–1498). The prosecutor's statement about Mrs. Schall to which petitioners object (Pet. 35) was that she "originally" became interested in the movement in an attempt to cure her husband's blindness, a fact established by the evidence (R. 394). As to healing in general (Pet. 22–23) there was evidence that petitioners had asserted, not merely that they could cure, but that they had actually cured hundreds of people, and that on the basis of such representation of fact petitioners had received substantial gifts. (See pp. 33–34 of the government's prior brief in this Court.) Evidence of such misrepresentations of fact was clearly pertinent to the issue of good faith and the prosecutor was justified in referring thereto. The statements that a verdict in this case would be warning to others who might attempt to use religion as a means to defraud (Pet. 36–37) were fair comment; similar statements to a jury have been upheld in other cases. *United States* v. *Dilliard*, 101 F. 2d 829, 837–838 (C. C. A. 2), certiorari denied, 306 U. S. 635; *Diggs* v. *United States*, 220 Fed. 545, 555 (C. C. A. 9), affirmed, 242 U. S. 470; *Remus* v. *United States*, 291 Fed.

501, 511–512 (C. C. A. 6), certiorari denied, 263 U. S. 717.

We agree with petitioners and with the dissenting judge below (Pet. 21–22) that comments on the failure to produce evidence of precipitation and other supernatural events went beyond the theory on which the case was tried and were, therefore, improper. However, we believe that petitioners and the dissenting judge below magnify these comments out of all proportion to their significance in the case. Early in the trial the judge gave the instruction upon which the prior decision of this Court turned—that the verity of religious experiences as such was not an issue for their determination (R. 402–404). This caution was reiterated throughout the trial in that counsel for the defense objected before the jury to questions propounded by the prosecutor because they conflicted with this instruction (R. 502) and defense counsel stated before the jury that they were predicating their presentation of the case on the instruction (R. 1125–1126). Most of the remarks to which petitioners now object were made in the opening argument for the government and that was followed by argument of defense counsel in which they repeated the judge's admonition in substance (R. 1336) and in *haec verba* (R. 1346–1349). The same instruction was also included in the judge's charge to the jury (R. 1576). In view of this emphasis on the un-

derlying theory of the case, the few statements of counsel that may be considered in conflict therewith could not have misled the jury and cannot be considered prejudicial.

The questioning by a juror to which petitioners advert (Pet. 20–21) does not give rise to a contrary implication when the question is considered in its setting. The question as to precipitation was asked of William J. Cassiere, a co-defendant, after he had testified to his idea of precipitation (R. 1105). Although the truth or falsity of the power of precipitation was not an issue for the jury, nevertheless the jury was entitled to know what the defendants preached. It was therefore not improper for the juror to seek clarification as to whether the defendants professed to believe in "a precipitation of gold or jewels from the invible to the visible" (R. 1105; Ex. 5 pp. 97–98) or precipitation in the form of obtaining articles by natural means such as the buying of a shirt (R. 1105–1106). That the question did not reflect a lack of understanding of the issues as limited by the trial judge is shown by the fact that Cassiere was acquitted.

The trial as a whole was eminently fair to petitioners. One of the counsel for defense, in his closing argument, complimented the presiding judge on his fairness and patience (R. 1324). When counsel for the defense objected to a statement made by the prosecutor in his opening argu-

ment to the jury, the judge made the following statement to the jury:

> Gentlemen of the jury, you are the sole judges of the facts in this case. On either side I am going to permit fullest argument and that is why I permitted the fixing the length of the argument so it can be thoroughly argued to the jury. You have listened to the evidence, and I again instruct you now to disregard any statements made by counsel on either side which you think in your best judgment have no foundation in fact from the evidence. In the heat of argument on both sides counsel will probably make remarks that do not fully conform to the evidence. Lawyers will do that, and even individuals will do that in the heat of argument. I just give you that general caution, and I think with the good sense and intelligence of the jury, if you find that extreme or extraordinary statements have been made, that you will disregard those statements and only pass judgment upon the evidence as interpreted by counsel (R. 1190).

Subsequently in his instructions to the jury the judge stated, "You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts" (R. 1597). It is significant that during the course of government counsel's argument no fur-

ther objection was made by defense counsel. In view of their experience (see R. 1183–4) it would seem that, if they had thought the prosecutor's conduct prejudicial, they would, at the very least, have reserved an exception at the close of the argument. That they did not do so is a clear indication that they did not consider the prosecutor's conduct prejudicial to their clients. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239; *Utley* v. *United States*, 115 F. 2d 117, 119 (C. C. A. 9), certiorari denied, 311 U. S. 719; *Heskett* v. *United States*, 58 F. 2d 897, 901 (C. C. A. 9), certiorari denied, 287 U. S. 643; *McDonough* v. *United States*, 299 Fed. 30, 38–39 (C. C. A. 9).

The jury's verdict in this case demonstrates that the remarks of counsel had none of the damaging effects which petitioners attempt to attribute to them. It is undisputed that the four defendants who were acquitted by the jury at the same time that petitioners were convicted were all active in the "I Am" movement, preaching its doctrines and participating in the solicitation of funds for its advancement (see R. 1015, 1088–1089, 1168–1169, 1172–1173). The acquittal of these four persons cannot be explained merely on the ground that they were not the active heads of the movement, for if the jury believed that no person could honestly entertain and further such unorthodox views, that factor would have made

no difference. Manifestly the jury did not judge the credibility of the doctrines, but the honesty of the persons preaching them.

4. Before trial petitioners moved to quash the indictment and later challenged the petit jury panel because of the exclusion of women (R. 110, 145, 232). A stipulation was entered into that "no women were called on this panel as trial jurors solely because of the fact that they were women and following the usual practice in this district"; "that it was always the practice of the judges in this court to not use women" (R. 233).[3] Both motions were denied (R. 233). The overruling of these motions was assigned as error (R. 191–192) but the question was not briefed and, we believe, not argued on the original appeal to the circuit court of appeals, and it was not briefed or argued in this Court. It was, however, raised on the remand of the cause.

Petitioners' contention (Pet. 62–76), accepted by the dissenting judge below (R. 1666–1668), that the exclusion of women from the grand and petit juries requires reversal of their convictions, is based on a misconception of the dictum of this Court in *Glasser* v. *United States*, 315 U. S. 60, 83–84. The decision in the *Glasser* case was directed at another contention, that the women se-

[3] Women are now called for jury duty in the federal district courts of California, *United States* v. *Chaplin*, 54 F. Supp. 682 (S. D. Cal.).

lected for the petit jury were drawn only from the members of the League of Women Voters who had received instructions in the functions of juries. This Court there denounced the limitation of a jury panel to a particular class which was not representative of the community and which was likely to be biased in favor of the prosecution. See 315 U. S. at p. 86. A jury limited to men only, but drawn from the community at large, is not unrepresentative of the community in the same sense as a jury which is limited to members of a particular race (*Smith* v. *Texas*, 311 U. S. 128), or a political party (see R. 1667–1668), or a particular economic class (*Glasser* v. *United States, supra*). Prejudice cannot be inferred by reason of the indictment or trial of a woman by a jury of men any more than it can be inferred from the indictment or trial of a man by a jury of women. See *United States* v. *Ballard*, 35 F. Supp. 105 (S. D. Cal.), and cases there cited. We think the position of the dissenting judge below that petitioners were prejudiced by the absence of women because women are more religiously inclined (see R. 1663–1666) is untenable. Interest in spiritual matters has never been limited to one sex. We submit that the exclusion of women from the jury panel does not have the same potentialities of prejudice as exclusion of members of a race or economic class, and therefore that it does not constitute grounds for reversal (see 18 U. S. C. 556).

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946